Petition

81-1469

SUPREME COURT, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF TENNESSEE,
Petitioner,

v.

RICKY LEE WEBB,
Respondent.

On Petition for Writ of Certiorari to
the Supreme Court of Tennessee

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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QUESTION PRESENTED

Whether admission of an undercover agent's testimony of incriminating statements that he heard the unindicted respondent make to his co-defendant while occupying the same jail cell violated the respondent's right to counsel protected by the sixth and fourteenth amendments.

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On Petition for Writ of Certiorari to
the Supreme Court of Tennessee

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

The petitioner, State of Tennessee, requests that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Tennessee entered in this proceeding on December 7, 1981.

OPINIONS BELOW

The opinions of the Supreme Court of Tennessee and the Court of Criminal Appeals of Tennessee have been designated for publication but have not yet appeared in the advance sheets. These opinions are reproduced in the Appendix, *infra*, at A-1 - A-10.

JURISDICTION

The opinion and judgment of the Supreme Court of the State of Tennessee were entered on December 7, 1981. This petition is

timely filed within sixty (60) days of that date. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. U.S. Constitution, Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

2. U.S. Constitution, Amendment XIV

> Section 1: "[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . ."

STATEMENT OF THE CASE

On September 22, 1976, a young woman, Charlotte Blurton, was brutally raped and murdered at her home in a rural area of Gibson County, Tennessee. The body of the victim was discovered by her husband at about 3:45 p.m. that day. The body was lying on the bed in the Blurton home, stripped of clothing from the waist down, and the couple's 18-month-old child was found lying on the bed beside his mother. Mrs. Blurton's death was caused by multiple gunshot wounds fired from a small caliber weapon, and .25 caliber shell casings were found near her body. Sperm was found in the vaginal orifice indicating recent sexual intercourse. Mrs. Blurton was last seen alive around noon on that day.

Carl Ray Webb, the respondent's nephew, was arrested and charged with the offenses. On the following day he showed the police where he had hidden the murder weapon. Subsequently he entered a plea of guilty to murder in the second degree and was sentenced to imprisonment for fifty (50) years. At trial the testimony of Carl Ray Webb was used to implicate the respondent. Carl Ray testified that the respondent had asked him to obtain a gun and that he had stolen a .25 caliber automatic. Carl

Ray further testified that he went with the respondent to the victim's home on the day in question. They knocked on the door and forced themselves into the house at gunpoint. Carl Ray said that first he and then the respondent raped Mrs. Blurton, after which the respondent shot Mrs. Blurton several times. The two of them then left the house, and Carl Ray threw the gun into a bulldozer pile.

The respondent, Ricky Lee Webb, was arrested on the basis of Carl Ray Webb's story, given as he entered his plea of guilty. At trial, the respondent was convicted primarily upon the testimony of Carl Ray Webb, his accomplice, and the information supplied by an undercover agent which forms the basis of the current controversy. The undercover agent's testimony was used to corroborate the testimony of the accomplice, as required by Tennessee law. The agent, Prentis Rogers, was working in cooperation with local authorities and was placed in the jail to obtain information concerning the case. The agent initially was placed in a cell with Carl Ray Webb for approximately two and one-half (2-1/2) days. (Appendix at ____, Tr. at 173-174). The agent was then placed in the cell with the respondent for another two and one-half (2-1/2) days. (App. at A-14, Tr. 188). During this period the agent did not instigate conversation about the crime and did not obtain any information concerning it from either of the Webb's. After this period, both Webb's were put into the same cell with the agent for a few hours. (App. at A-15, A-23, Tr. 189, 348). As soon as the Webb's were placed together, Carl Ray began making threats and accusations against Ricky Lee. (App. at A-15, A-25 - A-26, Tr. 189, 350-351). During the heated argument that ensued, the respondent stated to Carl Ray, "Yeah, man, I know I got you in a lot of trouble. I'm sorry I instigated the whole thing." (App. at A-15 - A-18, A-24 - A-26, Tr. 190-194, 349-352).

At the time of the crucial jailhouse confrontation, Ricky Lee Webb had been arrested for the instant offenses but neither in-

dictment nor other formal legal proceedings had been instituted against him. Neither Ricky Lee nor Carl Ray was aware that the third person in their cell was a paid informer for the State. (App. at A-14, Tr. 174-175, 181-183, 185-187, 188). The vaguely incriminating statements made by the respondent were directed to Carl Ray Webb, and not to the undercover agent, Prentis Rogers. Rogers was not a party to the conversation but merely reported what his fellow inmates had said to one another. Rogers' only participation in the episode was to break up an impending fight between the two Webb's. When they were about to take physical action against each other, Rogers jumped between the two of them and said, "There is not going to be any fighting in here. This place is too small as it is for three peoples in here." (App. at A-16, A-25, Tr. 191, 350). Rogers then said to Carl Ray, "Come here and sit on my bunk and calm yourself. Lower your voice. You get yourself together and you talk this thing over - you and Ricky and try to get some kind of understanding." (App. at A-17, A-25 - A-26, Tr. 192, 350-351). The record establishes that the undercover agent in no sense instigated the conversation, but merely that he attempted to break up the fight. Later after Carl Ray Webb was taken from the cell, the agent did talk with Rickly Lee and go over his story. None of these remarks were introduced at trial, however. (App. at A-18, Tr. 194). Prior to trial, the court heard the respondent's motion to suppress all of his statements made to or in the presence of Prentis Rogers on the basis of *Massiah* v. *United States,* 377 U.S. 201 (1964). (App. at A-6, Record at 32). After hearing extensive evidence on the issue (Tr. 171-216), the court ruled that statements made by the respondent to Carl Ray Webb and merely overheard by Prentis Rogers were admissible and would not be suppressed. (App. at A-6, R. 36). After hearing this and other testimony, the jury convicted the respondent of rape and first degree murder, for which he was sentenced to serve terms in the state penitentiary for ninety-nine (99) years and one day, and for life, respectively.

On appeal to the Court of Criminal Appeals of Tennessee, the respondent asserted the admissibility under *Massiah* of the statements of Prentis Rogers. (Brief at 16-19). That court determined that Rogers' statements were indeed inadmissible and refused to characterize their impact as harmless. (App. at A-7). The court therefore reversed the conviction and remanded the case for a new trial.

The State then was granted an appeal to the Supreme Court of Tennessee, relying upon alleged error in the intermediate court's applicaton of *Massiah*. The Supreme Court of Tennessee affirmed the decision below in its opinion issued on December 7, 1981. (App. at A-1). That court held that *Massiah* should be applied prior to indictment in light of the respondent's arrest. It also held that the actions of the undercover agent in urging the Webbs to sit down and discuss quietly their differences amounted to elicitation under *Massiah*. The Supreme Court therefore remanded the case for a new trial. In its opinion the Tennessee Supreme Court grounded its holding on the federal *Massiah* rule, as expounded in the recent decision in *United States* v. *Henry*, 447 U.S. 264 (1980). The court did not mention the Tennessee constitution in its ruling or purport to apply a different standard derived from the Tennessee constitution. The court relied only upon the federal constitution as interpreted by various federal and Tennessee decisions. Thus, there are not valid, independent state grounds for the decision reached by the court.

REASONS FOR GRANTING THE WRIT

I.

This Case Presents Special And Important Issues Warranting Review By This Court.

This case presents federal constitutional issues of the utmost importance, relating to the scope of a criminal defendant's right to counsel and the techniques of investigation permitted law enforcement authorities. Rule 17 of the Supreme Court states that review on writ of certiorari will be granted only where there are special and important reasons therefor. The decisions of the Tennessee state courts in this case have construed the federal constitution in a manner suggesting that review by this Court is necessary. The Tennessee Supreme Court, purporting to rely on federal precedents, has so broadly construed the rule of *Massiah* v. *United States,* 377 U.S. 201 (1964), as to extend the scope of that rule beyond the boundaries previously indicated by this Court. In particular, the instant decision, although it cites as authority the decision in *United States* v. *Henry,* 447 U.S. 264 (1980), in fact goes beyond the boundaries of the *Massiah* rule as expressed in that decision. The separate opinions of the Court in *Henry,* as evidenced by the careful distinctions drawn in the majority, concurring, and dissenting opinions, evidence that the boundaries of *Massiah* still are being clarified, that the doctrine in question should not be expanded, and that careful consideration should be given to a decision that treats very lightly the distinctions drawn by this Court.

The factual setting of the instant case thus presents important questions of federal constitutional law which have not been settled by this Court, but to which previous opinions have alluded and which should be settled by the highest Court of the land. Moreover, the instant decision conflicts with the holding in *Henry,* especially if that holding is premised upon the considerations expressed in the concurring opinion of Justice Powell, 447

U.S. at 275 (Powell, J., concurring). Because the current precedents of this Court leave substantial doubt as to the scope of criminal defendants' right to counsel under the sixth and fourteenth amendments, as well as the proper investigatory tactics that may be utilized by law enforcement authorities, this Court should grant a writ of certiorari to review the decision of the Supreme Court of Tennessee. The considerations expressed in Supreme Court Rule 17 as prerequisites to a grant of certiorari are clearly demonstrated by the instant matter.

II.

***Massiah* Is Inapplicable Here Because Respondent Had Not Been Indicted.**

In *Massiah* v. *United States,* 377 U.S. 201 (1964), an informer sought out a defendant who was under indictment and who was represented by counsel. By playing upon his previous friendship with the defendant, the informer was able to extract from the defendant incriminating statements which were heard by government agents equipped with a radio receiver several yards away. This Court held that such a procedure was illegal because the defendant's incriminating words had been elicited deliberately from him after he had been indicted and in the absence of his counsel. The instant situation is distinguishable from that of *Massiah,* which has been applied only to the use of statements obtained from defendants after their indictment. While the respondent had been arrested here in connection with the rape and murder of Charlotte Blurton, he had not been arraigned or indicated at the time the statements in question were made. Indeed, the sixth amendment right to counsel attaches only when formal judicial proceedings have been initated against the defendant, whether by way of formal charge, preliminary hearing, indictment, information or arraignment. *Kirby* v. *Illinois,* 406 U.S. 682 (1972). In the instant case none of

these proceedings had occurred and thus the respondent's sixth amendment right to counsel had not attached, rendering *Massiah* inapposite.

The federal courts have consistently held that *Massiah* applies to post-indictment or similar situations, not to every case of arrest. Custody, while crucial under *Miranda* v. *Arizona,* 384 U.S. 436 (1964), is not determinative under *Massiah.* Indeed, *Massiah* is a pre-*Miranda* case and derives from an entirely separate sixth amendment base. *See Rhode Island* v. *Innis,* 446 U.S. 291, 300 n.4 (1980). This Court's formulation of the *Massiah* rule in *United States* v. *Henry* explicitly premises its application upon the defendant's having been indicted. 447 U. S. at 265, 269. Considering the weak doctrinal foundations of the *Massiah* rule, it certainly should not at this late date be expanded to include pre-indictment elicitations. Because the decision of the Tennessee Supreme Court so construes the *Massiah* rule, this Court should grant the writ and review that decision.

III.

Massiah Is Inapplicable Because Remarks Were Not Deliberately Elicited From Respondent By The Undercover Agent.

Massiah should not be applied to the instant case because the incriminating statements in *Massiah* were deliberately elicited from the defendant by the government informer. In the instant case the undercover agent did not verbally elicit the crucial comments from the respondent, and respondent's making of the remarks later used against him cannot be attributed to stimulation by the agent. All of the respondent's comments that the State introduced through the undercover agent, Prentis Rogers, at trial were made spontaneously in response to accusations by Carl Ray Webb. This removes the case from the *Massiah* line, since there was no deliberate solicitation of incriminating statements here.

In this respect, the instant case differs in several crucial ways from the Court's most recent explication of the *Massiah* doctrine in *United States* v. *Henry*, 447 U.S. 264 (1980). In *Henry* the incriminating remarks were made by the defendant to a government agent who had been directed not to initiate conversations regarding the crimes in question. This Court determined, however, that the agent in *Henry* was more than a passive listener, and that Henry's incriminating statements to him were the product of their general conversation. In contrast, in the instant case respondent's incriminating remarks were made in conversation with his co-defendant which the undercover agent merely overheard. The agent was acting as a listening post rather than as a participant in the respondent's conversation. It is abundantly clear from the record that the respondent's remarks were not the product of any action by the agent and cannot be considered as having been deliberately elicited from the defendant. Respondent was in the cell with the undercover agent for two and one-half (2-1/2) days prior to the incident in question. During this time he made no statement to the agent about his crimes and clearly reposed in the agent no particular trust. The incriminating remarks were made only when the co-defendant, Carl Ray Webb, was placed into the same cell as respondent. The record reveals that immediately upon the Webbs' being placed in the same cell, Carl Ray began to make accusations toward the respondent, and the incriminating conversation ensued. Under no conceivable view of the facts can the undercover agent be deemed to have prompted this conversation between the Webb's. Rather, he was functioning clearly as a collector of information, a mere "listening post."

The court in *Henry* explicitly reserved for later consideration the instant issue. The court made this observation:

> The situation where the "listening post" is an inanimate electronic device differs; such a device has no capability of leading the conversation into any particular subject or prompting any particular reply . . . . However, that situation

> is not presented in this case, and there is no occasion to treat it; nor are we called upon to pass on the situation where an informant is placed in close proximity but makes no effort to stimulate conversation about the crime charged.

447 U.S. at 271 n.9. The instant case is that "listening post" case to which Chief Justice Burger referred. The informant here was placed in close proximity but did not induce the incriminatory conversation about the crime. In fact, the agent here was no more than the electronic "bug" sanctioned in *United States* v. *Hearst*, 563 F.2d 1331 (9th Cir. 1977), *cert. denied*, 435 U.S. 100 (1978). As noted by Justice Powell in his concurrence,

> [T]he sixth amendment is not violated when a passive listening device collects, but does not induce, incriminating comments. . . . Similarly, the mere presence of a jailhouse informant who had been instructed to overhear conversations and to engage a criminal defendant in some conversations would not necessarily be unconstitutional. In such a case, the question would be whether the informant's actions constituted deliberate and "surreptitious interrogation[]" of the defendant. If they did not, then there would be no interference with the relationship between client and counsel.

447 U.S. at 276 (Powell, J., concurring).

In this case an unindicted arrestee made incriminating remarks in the presence of an undercover agent. That agent, who did not engage in or provoke the conversation, merely overheard and reported incriminatory remarks made by the respondent to a cellmate. Although State authorities arranged the sort of situation in which discussion of the crime was likely, the holding of the Court of Criminal Appeals that they "deliberately elicited" the remarks is a major and unwarranted expansion of *Massiah*.

The Tennessee Supreme Court placed reliance upon the fact that during the Webbs' conversation, the agent prevented physical violence between them and told them to sit down and discuss quietly their differences. This action of the undercover agent does not remove the case from the rationale stated *supra*. The agent's remarks were directed to Carl Ray Webb, not the respondent, and the respondent clearly did not engage in any conversation with the agent. Moreover, the agent's actions merely amounted to breaking up a fight and encouraging his cellmates to lower their angry voices. His actions in this regard did not stimulate the conversation between the Webbs. That loud, angry, and incriminatory conversation was stimulated by the Webb's themselves and not by any action of the undercover agent. *See United States* v. *Henry*, 447 U.S. at 271 n.9. Clearly the agent here did not participate in the conversation in anything approaching the degree of the agent's participation and elicitation in *Henry*. In order to apply *Massiah* to the instant situation, that decision must be expanded beyond the *Henry* boundaries and made even broader in scope than had been thought generally.

The conclusion that this is not a *Massiah* case is buttress by the rationale of *United States* v. *Hearst*, 563 F.2d 1331 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978), the infamous Patty Hearst bank robbery case. There an electronic monitoring device was deliberately used by jail officials to record conversations between Patty Hearst and her childhood friend, Patricia Tobin. The Ninth Circuit refused to apply *Massiah* to the facts surrounding the making of the Tobin tape because of the absence of any governmental effort to elicit incriminating statements from Ms. Hearst. Tobin did not engage her at government direction in the conversation later used against her. The court rejected the argument that deliberate secret listening sufficed as the prohibited "deliberate elicitation" of incriminating statements. It thus held that Ms. Hearst's sixth amendment right to the assistance of counsel was not violated because she was not interrogated by the State. 563 F.2d at

1347-48. The same rationale applies to the instant case, since Carl Ray Webb was not acting as a government agent and since the informer merely performed the same function, and certainly even less offensively, as the electronic device in *Hearst*.

In the instant case there was no interrogation and no solicitation of incriminatory statements from the respondent. The testimony of Prentis Rogers is no different from that which might have been obtained from any inmate who happened to have been in the cell when Carl Ray Webb began making accusations against the respondent. Indeed, the Court of Criminal Appeals did not question the admissibility of the very similar testimony of Samuel Anders, who at one time also was incarcerated with the respondent. In this instance, the State through able investigative work simply happened to place a witness within hearing range who was subsequently capable of testifying in court to the respondent's admissions.

Because of the minimal actions of the undercover agent, the only possible distinction here is not his presence, but the fact that the State put Carl Ray Webb in the same cell with the respondent, surmising that incriminating conversation might ensue. While actions may amount to "deliberate elicitation," the State submits that this simply is not the sort of action to which *Massiah* applies. Certainly a gesture may be as relevant as are words, since a gesture amounts to a verbal act. All of the *Massiah* cases, however, refer to elicitation that is some sort of obvious communication. Here the placement of the Webb's in the jail cell was not communicative in any sense and cannot be termed "deliberate eliciation."

While the subjective intent of State investigators is important in *Miranda*-type cases, at least in the wake of *Rhode Island* v. *Innis*, 446 U.S. 291 (1980), this Court made very clear in *Innis* that interrogation for purposes of *Miranda* is not interchangeable with interrogation or elicitation under the sixth amendment and *Messiah*. 446 U.S. at 300 n.4. Much has been

made in the instant case of the subterfuge engaged in by the State in placing an undercover agent in the respondent's cell. No impropriety was committed in this regard, since the agent did not solicit the incriminatory statements from the respondent or encourage Carl Ray Webb to do so. That the statements were overheard not by a normal inmate but by an undercover agent placed in the cell by the State in hope that the respondent would make just such remarks should make no difference. While courts sometimes mention the impropriety of surreptitious State action, this court in *Brewer* v. *Williams,* 430 U.S. 387, 400-401 (1977), indicated that that potential distinction should be without force:

> That the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant.

The secret device employed in *Hearst* certainly was more of a subterfuge than the agent's presence here, for here the monitoring was apparent, and only its purpose was undisclosed to the respondent. The successful action of the State in placing an informant in the cell, rather than waiting for an inmate to accidently hear an incriminating remark (which also occurred) produced no taint of constitutional impropriety.

Ths interests of justice and sound constitutional adjudication suggest that this Court should reconsider the *Massiah* doctrine in the instant factual setting. The decision of the Supreme Court of Tennessee has expanded *Massiah* beyond its previous application at a time when this Court has demonstrated reluctance to do so and when scholars have questioned the very constitutional foundation of *Massiah. See* Y. KAMISAR, "Brewer v. Williams, Massiah, and Miranda: 'What is Interrogation'? When Does It Matter?" 67 GEO. L. J. 1 (1978). Moreover, this case does not neatly fall into the rational of the court expressed in *United States* v. *Henry,* the most recent decision in this area. The crucial remarks here were not deliberately elicited from

respondent Ricky Lee Webb by words or actions of State agents. The agent in no way tricked, deceived, or coerced the respondent into making the statements that were introduced into evidence at trial. These statements were made by respondent freely and voluntarily to a third party, Carl Ray Webb, who for a brief period was in the same jail cell. Carl Ray Webb was not an agent of the State or aware of the presence of the informer. The Tennessee court, in refusing to allow testimony of the agent relating the respondent's incriminating statements, has expanded *Massiah* to the breaking point, and that decision merits review by this high Court.

IV.

Any Error In The Admission Of Evidence Was Harmless In The Constitutional Sense.

Even if the challenged remarks are considered to bear constitutional taint under *Massiah,* their admission was harmless in the constitutional sense under the doctrine of *Chapman* v. *California,* 386 U.S. 18 (1967). The challenged statements made by Ricky Lee Webb and considered as being incriminatory are vague and at best consist of little more than his statement that he instigated the trouble. That falls far short of a solid confession of guilt or even complicity in the crime. The questioned testimony was admitted at trial merely as corroboration of the otherwise strong testimony by Carl Ray Webb and other witnesses. The Court of Criminal Appeals found sufficient corroborating testimony otherwise in the testimony of Samuel Anders of the statements that respondent made to him. Since the evidence against the respondent was strong and compelling from many sources, and since any tainted testimony of the undercover agent is weak at best, this Court should hold the admission of the improper evidence to have been harmless beyond a reasonable doubt and in the constitutional sense.

V.

SUMMARY

It is apparent that the decision of the Tennessee courts has worked a significant and unwarranted extension of the *Massiah* rule and has expanded the protection offered criminal defendants by the sixth and fourteenth amendments beyond the previous decisions of this Court and the federal courts generally. Since this decision involves important matters of individual rights, governmental authority, and constitutional law, and since it presents issues which have been specifically reserved in prior decisions of this Court, petitioner submits that this Court should review the judgment of the Supreme Court of Tennessee and should clarify this important area in constitutional adjudication.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix

APPENDIX 1

In The Supreme Court Of Tennessee At Jackson

For Publication
December 7, 1981

State Of Tennessee,
Plaintiff-Appellant,

vs.

Ricky Lee Webb,
Defendant-Appellee.

Gibson Criminal
C.C.A. NO. 2
Hon. Dick Jerman, Judge

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OPINION

Judgment Of Court Of Criminal Appeals Affirmed.

Harbison, C.J.

The Court of Criminal Appeals reversed the conviction of appellee in the present case because of the admission into evidence of incriminating statements which he made in the presence of an undercover agent while being held in jail after arrest. The trial court excluded statements made by appellee directly to the agent but permitted the agent to testify concerning statements made by appellee to his nephew, who was also placed in the same jail cell and who had just pled guilty and had been sentenced for participating in the same offenses for which appellee had been arrested and charged. The agent not only overheard these statements but participated in eliciting them. Appellee and his nephew were arguing angrily, and the agent urged them to sit down and discuss quietly their differences. He had been placed in the cell with appellee and the nephew for the very purpose of procuring information about appellee's participation in the crime for which he was charged. The Court of Criminal Appeals held that the evidence obtained by the undercover agent was inadmissible and reversed the conviction.

This Court granted review upon application of the State because at that time the decision of this Court in *State* v. *Berry*, 592 S.W.2d 553 (Tenn. 1980), was the subject of a pending petition for certiorari to the Supreme Court of the United States. Also at that time the Supreme Court had granted review in the case of *United States* v. *Henry*, 590 F.2d 544 (4th Cir. 1978), *cert. granted*, 444 U.S. 824 (1979). This Court had cited and relied upon the *Henry* case in its decision in *State* v. *Berry*, *supra*.

Subsequently the Supreme Court of the United States denied review in *Tennessee* v. *Berry*, 449 U.S. 887, 66 L. Ed. 2d 112 (1980). It also affirmed the decision in *United States* v. *Henry*, 447 U.S. 264 (1980).

In light of this action by the Supreme Court of the United States, we are of the opinion that the Court of Criminal Appeals correctly decided the issues in the present case. We are not per-

suaded by the contention of appellant that there is a significant distinction in the present case from *United States* v. *Henry, supra,* because the incriminating statements uttered by appellee occurred prior to indictment while those of the accused in *Henry* occurred after indictment. Appellee was already in custody and under arrest pursuant to the issuance of a formal warrant charging him with the offenses for which he was subsequently convicted. In our opinion, formal criminal proceedings against him had commenced, and the fact that the statements made by him occurred prior to actual indictment is not controlling. *See State* v. *Mitchell,* 593 S.W.2d 280 (Tenn. 1980).

With these observations, we affirm the judgment of the Court of Criminal Appeals and direct that its opinion be published herewith. The cause is remanded to the trial court for a new trial in accordance with the opinion of the Court of Criminal Appeals, costs incident to the appeal being taxed to the State.

/s/ William J. Harbison, C.J.

Fones, Cooper, Brock and
Drowota, JJ., concur.

APPENDIX 2

In The Court Of Criminal Appeals Of Tennessee, At Jackson

January 1980

State Of Tennessee,
Appellee,

v.

Ricky Lee Webb,
Appellant.

No. 2
Gibson Criminal
Honorable Dick Jerman, Judge

(Rape and murder in the first degree)

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Judgment Reversed And Remanded
Mark A. Walker, Presiding Judge
Opinion Filed: April 17, 1980

OPINION

The appellant, Ricky Lee Webb, was charged in separate indictments returned by the Gibson County grand jury with the first degree murder and rape of Charlotte Blurton. He was tried October 23-25, 1978, and found guilty of both charges. The jury set his punishment at life imprisonment for the murder and 99 years' and one day imprisonment for the rape. The trial judge ordered that the sentences be served consecutively. Webb now appeals to this court.

The state's evidence showed that Charlotte Blurton was found dead by her husband about 3:45 p.m. on September 22, 1976. Her body was lying on a bed in their Gibson County home stripped of clothing from the waist down. Their 18 month old child was lying on the bed beside his mother. Mrs. Blurton's death was caused by multiple gunshot wounds fired from a small caliber weapon, and .25 caliber shell casings were found near the body. Sperm was found in the vaginal oriface indicating recent sexual intercourse. She was last seen alive around noon.

Carl Ray Webb, the appellant's nephew, was arrested and charged with the offense. On the day after the homicide, he showed the police where he had hidden the murder weapon and a .25 caliber pistol was recovered. Subsequently, Carl Webb entered a guilty plea to murder in the second degree of Mrs. Blurton and was sentenced to imprisonment for 50 years.

At trial, Carl Webb testified that the appellant had asked him to obtain a gun and that he had stolen the .25 automatic from Adam Spinks.

He further testified that he and the appellant decided to walk into Gibson on the day in question. As they were passing the victim's home, the appellant said, "Let's go off in there." They knocked on the door and when Mrs. Blurton appeared the ap-

pellant presented the gun and they both entered the house. First he and then the appellant raped Mrs. Blurton, after which the appellant shot Mrs. Blurton several times. The two then left the house and Carl threw the gun into a bulldozer pile.

Other testimony placed the appellant in Carl Ray Webb's company about noon on the day in question.

Prentis Rogers, an undercover agent working in cooperation with the local authorities, was placed in the same jail cell with the appellant and Carl Webb. Rogers was placed in the cell in order to obtain information concerning the homicide. The trial judge would not allow into evidence any testimony concerning what was said to Rogers in the jail cell. However, the trial judge did allow Rogers to testify about the conversation he overheard between the appellant and Carl Webb.

Rogers testified that after a heated argument the appellant stated to Carl Webb, "Yeah, man, I know I got you in a lot of trouble. I'm sorry I instigated the whole thing."

Samuel Anders, who was also incarcerated with the appellant, but who was not working in cooperation with the authorities, testified that the appellant had told him that he had gone to the victim's home with Carl and that they left the home together, but Carl had murdered Mrs. Blurton.

Howard Gillespie, also a fellow jail inmate with the appellant, testified that the appellant told him that he knew the victim and knew who committed the crime.

The appellant testified denying any participation in the crime and presented several witnesses in an attempt to establish an alibi.

In the appellant's initial issue presented for review, he claims that the trial judge erred in allowing into evidence the testimony of undercover agent Rogers concerning the conversation he had with Carl Ray Webb in jail. The appellant contends that this

evidence was obtained in violation of his sixth amendment right to counsel as formulated in *Massiah* v. *United States,* 377 U.S. 201, 12 L.Ed.2d 246, 84 S.Ct. 1199 (1964), and *Brewer* v. *Williams,* 430 U.S. 387, 51 L.Ed.2d 424, 97 S.Ct. 1232 (1977). The appellant also contends that absent this evidence there was insufficient evidence to support the verdict and that his motion for judgment of acquittal should have been granted in that there was insufficient corroboration of his accomplice's testimony.

As stated in *Brewer,* 430 U.S. at 401, 51 L.Ed.2d at 438, 97 S.Ct. at 1240, "(T)he clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."

In the present case there is no question that adversarial proceedings had commenced against the appellant in that an arrest warrant charging him with the offense had been issued. The issue in this case is whether the action of the government constituted an "interrogation." It is clear that Rogers was placed in the cell with the appellant for the purpose of obtaining information concerning the homicide. Likewise, Carl Webb was placed in the same cell with the appellant in hope that an incriminating conversation would take place. It did. The incriminating statements were deliberately elicited by action of the state. This action amounted to an interrogation. We agree with the appellant that his right to counsel was subverted. In these circumstances the officers did indirectly what they could not do directly. The trial judge erred in allowing Rogers' testimony into evidence. cf. *State* v. *Berry,* 592 S.W.2d 553 (Tenn. 1980). This error cannot be deemed harmless.

However, we are unable to agree with the appellant's conclusion that absent the inadmissible evidence there was insufficient evidence to corroborate Carl Webb's testimony.

Slight circumstances may be sufficient to furnish the necessary corroboration of an accomplice's testimony. *Bolton*

v. *State,* 591 S.W.2d 446 (Tenn.Cr.App. 1979). As previously mentioned, Samuel Anders testified that although the appellant denied that he had committed the murder the appellant had admitted to him that he went to the victim's home with Carl Webb and that they left together. The appellant also stated to Anders that Carl Webb did the shooting while he was in a different part of the house. The appellant's presence in the victim's home while she was murdered is sufficient to corroborate Carl Webb's testimony.

Likewise, absent Rogers' testimony, we still conclude that there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *Jackson* v. *Virginia,* 443 U.S. ____, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979). Nor was error committed in denying the motion for judgment of acquittal. *State* v. *Cabbage,* 571 S.W.2d 832 (Tenn. 1978).

Although the case must be reversed and remanded for a new trial, we have examined all other issues and find them to be without merit.

In the appellant's next issue presented for review, he contends that the trial judge erred in denying his motion challenging the composition of the petit jury panel on the ground that blacks were systematically and discriminatorily excluded.

The appellant presented evidence that 88 people constituted the jury panel. The racial composition of the jury panel was not shown. The only evidence concerning the racial composition of the jury panel was that at least 12 people were black. No other evidence of discrimination in the selection of the jury panel was shown. Furthermore, no census figures reflecting the black-white ratio of that part of Gibson County served by the Humboldt Law Court were presented. The appellant has failed to make out a prima facie case of discrimination. *Castaneda* v. *Partida,* 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977). This issue is without merit.

Next, the appellant claims that the trial judge erred in admitting into evidence over his objection a color photograph of the victim which was taken shortly after she was found. The photograph depicts the victim with no clothes on from the waist down and a considerable amount of blood. However, the picture was taken from a considerable distance and although unpleasant we cannot say that its prejudicial effect outweighed its probative value. *State* v. *Banks,* 564 S.W.2d 947 (Tenn. 1978).

Next, the appellant claims that the trial judge erred in refusing to charge the jury his special request concerning the presumption of innocence. However, the trial judge adequately covered this matter in his general charge. It is not error to refuse a special request where the charge as given fully and fairly states the applicable law. *Edwards* v. *State,* 540 S.W.2d 641 (Tenn. 1976).

Next, the appellant claims that his sentence of 99 years and one day for the rape conviction was excessive and exhibited passion and capriciousness on the part of the jury. However, the sentence was well within the range of punishment authorized by statute. A verdict which falls within the range permitted by statute cannot be considered excessive. *Williams* v. *State,* 491 S.W.2d 862 (Tenn.Cr.App. 1972). Nor can it be said to show passion, caprice or prejudice by the jury. *Carroll* v. *State,* 212 Tenn. 464, 370 S.W.2d 523 (1963). This issue is without merit.

In the appellant's last issue presented for review, he contends that the trial judge abused his discretion in ordering his sentences to be served consecutively. The trial judge found that the appellant was a dangerous offender. We agree. Therefore, we can find no abuse of discretion. *Grey* v. *State,* 538 S.W.2d 391 (Tenn. 1976).

Reversed and remanded for a new trial.

/s/ Mark A. Walker,
Presiding Judge

CONCUR:

/s/ John K. Byers, Judge

/s/ Allen R. Cornelius, Jr., Judge

APPENDIX 3

Proceedings On Motion To Suppress

In The Circuit Court Of Gibson County, Tennessee,
At Humboldt

No. 4374 & 4375

State Of Tennessee,
Plaintiff,

vs.

Ricky Lee Webb,
Defendant.

Motion To Suppress

The Defendant, Ricky Webb, moves this Court, in accordance with Rule 12 of the Tennessee Rules of Criminal Procedure, to direct that any and all statements made by Defendant to and/or in the presence of Prentis Rogers be suppressed as evidence and that same not be allowed to be introduced into evidence by the oral testimony of Prentis Rogers.

Said Motion is based upon the fact that at the time any such alleged statements were made Prentis Rogers was acting covertly as a special agent for the office of the Attorney General in an effort to solicit such statements in a secretive manner and such statements were elicited from Ricky Webb in violation of the rights secured him under the Fifth and Sixth Amendments of the Constitution of the United States.

WHEREFORE, DEFENDANT PRAYS for an Order of this Court suppressing any such alleged statements made to and/or in the presence of Prentis Rogers.

FLIPPIN, COLLINS & HUEY
310 Main Building
Milan, Tennessee 38358

BY: FRED COLLINS
Attorneys for Defendant

In The Humboldt Law Court Of Gibson County, Tennessee
October Term, October 23, 1978
Minute Book 23, Page 975

State Of Tennessee

vs.

Ricky Lee Webb

The Defendant further moved the Court by motion to suppress the evidence, and all parts thereof of statements made in the presence or to Prentiss Rogers. After hearing arguments of counsel, the Court took said motion under advisement and the cause was continued until Tuesday, October 24, 1978.

Thereupon, Court adjourned until Tuesday, October 24, 1978.

Dick Jerman
Judge

In The Humboldt Law Court Of Gibson County, Tennessee
October Term, October 24, 1978
Minute Book 23, Page 976

Court met pursuant to adjournment, present and presiding the Honorable Dick Jerman, Judge of the Thirteenth Judicial Circuit, when the following proceedings were had and entered of record, to-wit:

State Of Tennessee

vs. Nos. 4374 and 4375

Ricky Lee Webb

Came the Attorney General who prosecutes for the State and the defendant in his own proper person and through his attorneys of record, the Honorable Ben Huey and the Honorable Fred Collins. It appearing to the Court that the motion by the defendant to suppress as evidence, statements made in the presence of and to Prentiss Rogers is well taken in part and not well taken in other parts.

It is therefore ordered that any statements made by Carl Ray Webb and the defendant, Ricky Lee Webb and overheard by Prentiss Rogers is admissible in evidence and will not be suppressed.

It is further ordered, adjudged and decreed that any question addressed directly to the defendant, Ricky Lee Webb by Prentiss Rogers and answered by the defendant, Ricky Lee Webb, will not be admissible and as to that part of the said motion it is sustained.

All of which is so ordered, adjudged and decreed on this the 24th day of October, 1978.

Dick Jerman
Judge

APPENDIX 4

[187] Testimony of Prentis Rogers
at Hearing on Motion to Suppress,
October 23, 1978,
in the Circuit Court of
Gibson County, Tennessee

PRENTIS ROGERS was called and being duly sworn was examined and testified as follows:

Direct Examination
By Mr. Huey:

Q. This is Prentis Rogers? A. Yes.

Q. What line of work are you in? A. Special undercover work for the U. S. Treasury Department.

Q. Do you occasionally get loaned out to the TBI? A. Yes.

Q. Were you on loan on January 11, 1978? A. Yes, I was.

[188] Q. Do you recall being placed in the Gibson County jail? A. Yes, sir.

Q. Were you placed in the same cell with Carl Ray Webb? A. I was.

Q. I'll ask you, do you know whether Carl Ray Webb was informed about your undercover background at the time you first got in the cell with him? A. No, he wasn't.

Q. Now, at that time you played a tough guy, I believe, or a bad type person? A. I went under the alias of Bob Parker.

Q. I'm sorry? A. At that time, my name was Bob Parker.

Q. You told Carl Ray Webb that you had killed some policemen and robbed banks and that sort of thing? A. That's right.

Q. How much time did you spend in the cell with him? A. Two and a half days.

Q. And then you went in the cell with Ricky Webb? A. Yes, I did.

Q. How much time did you spend in there with him? A. Approximately two and a half days.

Q. During that time you were in the cell with Ricky Lee Webb, he never made any incriminating statements concerning this murder, did he? **[189]** A. Well, the first two and a half days, I was with Carl Ray.

Q. I'm asking about the two and a half days that you were in the cell with Ricky Lee Webb, Ricky Lee Webb never made any incriminating statement. Is that not correct? A. Not until after the three of us was in the cell together.

Q. My question is, during the two and a half days you were alone in the cell with Ricky Lee Webb, Ricky Lee Webb never made any incriminating statement, did he, Mr. Rogers? A. No, he did not.

Q. Now, after the two and a half days you were with Carl Ray Webb and after the two and a half days you were with Ricky Webb, then for about four hour period Ricky Lee Webb and Carl Ray Webb were placed in the same cell with you? A. They was.

Q. At that time, I'll ask you, did Carl Ray Webb make accusing statements to Ricky Webb? A. He did.

Q. Such as what did he say? A. Well, upon placing Carl Ray Webb in the cell with Ricky and myself, immediately after the jailer had closed the door, Carl Ray accused Ricky of getting him in serious trouble.

Q. Immediately as soon as that door was slammed? **[190]** A. He did.

Q. What did Carl Ray say? A. The whole statement?

Q. Yes, sir. A. He said, "say, man, they have the nerve to lock me up in here with you." Do you want the complete statement?

Q. Yes, sir, I want to hear it like it was. A. Word for word?

Q. Yes, sir. A. He said, "well, man, you mean to tell me they locked me up in here with your greasy ass."

Q. That's Carl Ray Webb's statement? A. That's right.

Q. All right. A. He said, "I'd like to kill you."

Q. Carl Ray Webb said that? A. Yeah. He said, "man, the trouble you have got me into. Fifty years." He said, "you've got me fifty years." At this time Ricky stated, "man, I don't know what you're talking about." He said, "you know damn well what I'm talking about. Fifty years, man, of my life just throwing away messing around with you." He said, "you know that you killed that woman and you know that you raped that woman." He said, "they gave me fifty years." At this time Ricky Lee Webb stated, "man, these people has brainwashed you. You don't know what you're **[191]** talking about. You don't know what you're saying." He said, "the hell I don't know what I'm saying." He said, "man, you've been running around in the street playing pretty papa. You're a ladies man. You think you are hip. I've been laying up in this cell fifteen months." He said, "you're not even bringing me a package of cigarets and not even coming to visit me." He said, "your girlfriend wanted to come to see me." He said — he called her Kathryn or something like that. He said, "she wanted to come and see me and you wouldn't let her come and see me because you was afraid she would tell me something that you didn't want me to know." At this time, Ricky denied this. He said, "man, I didn't care about Kathryn coming to see you. She could have came and see you." He said, "you're a lie man. I got

word that she wanted to come and see me and you would not let her. But fifty years of my life man, blown down the drain." At this time he was raving — he was talking real loud and each time that he would make this statement Ricky would say, "man, I don't know what you're talking about." He would say, "these people have brain washed you constantly." Finally Carl Ray jumped up and then he wanted to fight. They squared off and I stood between the two of them. I said, "look man, there is not going to be any fighting in here."

Q. You talked to both of them, didn't you? A. I was talking to both of them. I said, "we're living in too close confinement as it is." I said, "we don't have room **[192]** to fight. There is not going to be any fighting." I said, "say, Carl Ray, lower your voice." I said, "come here and sit on my bunk and calm yourself. Lower your voice." At this time, Carl Ray began to calm down and sat on my bunk. I said, "you get yourself together and you talk this thing over — you and Ricky and try to get some kind of understanding." About that time, Carl Ray sat down and lowered his voice. He said, "fifty years man, you got me for messing around with you. All my life I've been taking your down falls. Every time something come up I would be the one to be accused of it." He said, "I'm tired. You're going to do this fifty years with me." He said, "say, man, say look, I know I got you in hot water." He said, "I'm sorry." He said, "man, look, I can't do no time. I can't do no time at all." He said, "say, man, I've got a little gig going on outside for me." Said, "I've got some money coming in and I'll share it with you." That's Ricky saying that. Carl Ray said, "money. What good is money going to do me where I'm going, man." He said, "fifty years, man, money is not gonna do me any good." About this time Ricky said, "look man, there is no sense in both of us doing this time." He said, "you've already got your time. You go on and do it, man." He said, "I've got a baby out on the streets and got one on the way and man, I can't do no time." He said, "I'm sorry I got you into this." He said, "man, when you

came down there to that bridge, man, I told you, what had you done. You act like you was **[193]** in a daze, man. When you handed me the pistol I was crazy in the first place for taking that pistol from you." He said, "you could have thrown it in the ditch yourself." He said, "but you gave it to me." He said, "fifty years, man, of my life gone down the drain." At this time, Ricky said, "man, I can't do no time." He said, "time ain't for me." He said, "look man, I'll look out for you." He said, "you go on and do your time and while I'm out here I'll look out for you." He said, "man, you gonna do just like you did when I've been in here these fifteen months." He said, "I haven't seen your greasy ass. In fifteen months I've been locked up here, you wouldn't even give me a package of cigarettes." Then he started hollering. He said, "Jim, come and let me out of here before I kill this so and so. And, "Shirley," — this was the girl who was about two or three cells down from the three of us, "cal the turn key and let me out." About this time, Shirley began to call the turn key.

Q. What happened then, Mr. Rogers? A. About that time, I called Shirley. I said, "Shirley." She said, "what?" I said, "don't call the turn key. He can't hear you any way." Shirley stopped. Then about that time Carl Ray started back in on Ricky. He said, "man —

Q. Carl Ray started in on Ricky again? A. Yeah, started in on Ricky again.

[194] Q. Carl Ray was instigating this conversation? A. Yes. He said, "man, I've been following you. I admired you, man. You was my idol." He said, "I worshipped you." He said, "I done everything that you ever told me, I liked to follow you around." He said, "I liked to go with you." He said, "but you got me in trouble, man, fifty years of my life." He said, "do you remember the time you raped that woman and they put if off on me?" He said, "I taken the blame for that." He said, "all my life, man, I've been taking the blame for your wrong doing."

He said, "I'm tired of it. You're gonna do this fifty years with me." He said, "man, I'm sorry I got you in this trouble." He said, "but like I told you, I can't do no time." It went on like that until finally the man came and got him out.

Q. Came and got who out? A. Carl Ray.

Q. And then you stayed in there with Ricky? A. Yes. I did.

Q. And didn't you after Carl Ray left and things quieted down, didn't you say, "come on, Ricky, let's go over your story again. Didn't you? A. Yes.

Q. Did you go over it several times with him? A. Two or three times.

Q. At any time did you advise him of his rights when you **[195]** went over those stories with him each time? A. Well, no.

Q. You did not advise him of his rights? A. No, I did not.

Q. Were you wired, Mr. Rogers? A. Yes, I was.

Q. Where is the tape transcript? A. Well, the tape only played for a short while and then it played out.

Q. Where is that tape now? A. You'll have to ask him.

Q. Lieutenant Espey? A. Yes.

Q. He has it? A. I don't know. You would have to ask him. I have no knowledge about it.

Q. You turned it over to him? A. I turned it over to the Detective who was in charge of the investigation.

Q. What were your instructions when you were placed in the cell with Ricky? A. To see if I could get them to admit their innocence or guilt in the rape of Mrs. Charlotte Blurton.

Q. You started your testimony by telling me you are a pro at this, aren't you? **[196]** A. Well, I've been at it for about eight years.

Q. Worked for the Federal government? A. Yeah.

Q. Your job is to illicit statments that help convict people? A. Well, no.

Q. Isn't that true? A. No, it's not true.

Q. Well, if you didn't turn out any statements that convicted anybody you — they wouldn't pay you very much? A. Well, I don't work and I gets paid anyway.

Q. If you quit convicting folks, they would take you off the pay roll?

GENERAL SCHOONOVER: Your Honor, that's argumentative.

THE COURT: I think it is.

Q. When you went in the cell with Ricky Lee Webb, you had been briefed by your supervisor, Warren Jones? A. Yes, I had.

Q. Had you been briefed by Detective Espey or any other of the detectives? A. Yes.

Q. You knew that Ricky Lee Webb had been charged with murder? A. No, sir, he hadn't been charged with murder.

Q. Accept just for the moment that he had — he had been **[197]** arrested for murder? A. No, he was free.

Q. No, sir, you were in the cell with him. He was locked up. A. Yes, sir.

Q. And he had been arrested? There is previous testimony here by the arresting officer that he had been arrested for murder? A. Well, I don't know what he was arrested for, but he was there.

Q. You had been briefed about this Charlotte Blurton matter? A. Yes.

Q. So you were in there to seek testimony concerning the murder and rape of Charlotte Blurton? A. Or the innocence of it.

Q. How were you in the cell — what do you mean he was free? A. He wasn't locked up at the time.

Q. How were you in the cell with him? A. I don't know whether he was locked up or not. They locked me up first. I was with Carl Ray Webb.

Q. But when you were in the cell with Ricky Webb, you told me that turn key locked you in there? A. That's right. They locked him up with me. See, I was **[198]** locked up before he was locked up.

Q. You are black? A. I am.

Q. Ricky Webb is black as is Carl Ray Webb? A. Yes.

Q. As a professional policeman with many years experience, did you form any opinion as to the educational background and abilities of Ricky Webb? A. I do not.

Q. Would you consider him average —an average male? A. Well, no, not necessarily.

Q. Would would you consider him? A. Well, the opinion I formed on Mr. Ricky Webb, I feel like he is mentally sick.

MR. HUEY: That's all.

(WITNESS EXCUSED)

* * * * * * * *

APPENDIX 5

[345] Testimony of Prentis Rogers
at Trial, October 24, 1978,
in the Circuit Court of
Gibson County, Tennessee

PRENTIS ROGERS was called and being duly sworn was examined and testified as follows:

Direct Examination
By General Peeples:

Q. Mr. Rogers, I have talked to you before and I know that your voice is not as loud as mine and you're going to have to talk a little louder than you normally talk. I'm going to ask you questions and I want you to direct your answers to all of the questions to this jury. What is your occupation? A. Special Undercover Agent for the U. S. Treasury Department.

[346] Q. You are an undercover agent? A. Yes.

Q. Do you work for organizations other than the U. S. Treasury Department? A. Yes, sir, sometimes I'm loaned out to the state for undercover work.

Q. How long have you been doing undercover work? A. Approximately eight years.

Q. Who have you done undercover work for? A. For the U. S. Treasury, TBI and various cities.

Q. Were you employed to do undercover work in a case involving Ricky Lee Webb and Carl Ray Webb? A. I was, sir.

Q. When were you employed? A. January 9, '76, I think — '77. January 9, 1977.

Q. And pursuant to your employment, what did you do? A. I was confined in Trenton jail in Gibson County.

Q. Under what name, sir? A. Under the alias of Bob Parker.

Q. What had Bob Parker supposedly done to get himself put in the Gibson County jail? A. He had robbed a bank and killed a police officer in southern Illinois.

Q. Was any one in the jail cell that you were placed in? A. Carl Ray Webb was in the cell that I was placed in, sir.

[347] Q. And how long were you in a cell with Carl Ray Webb? A. Two and a half days.

Q. Were you ever in a jail cell with anyone else? A. With Ricky Lee Webb.

Q. Do you recall the day that Carl Ray Webb entered a plea of guilty in a case in the Courtroom? A. I do, sir.

Q. Where were you on that day, sir? A. I was in jail that day. I think it was the 11th of January.

Q. So you were in jail and you were there doing undercover work? A. I was there doing undercover work.

Q. Was anyone in the cell with you? A. At the time I was there, the first two and a half days — Monday January 9th, I was placed there, Carl Ray Webb was in jail.

Q. I'm speaking, sir, of the day that Carl Ray Webb entered a plea of guilty? A. I was there by myself.

Q. All right. Tell this jury, if you will, what happened when Carl Ray Webb returned from his trial? A. Well, after he returned from his trial, he was down hearted. I asked him how did it come out and he told me that it —

[348] Q. Excuse me, sir. I'm not asking you anything that Carl Ray Webb said. I'm just simply asking what happened. Did he return to the cell? A. He did.

Q. Did anyone else come in to the cell? A. They placed Ricky in the cell immediately after two and a half days.

Q. Let me ask you this to make sure there is no confusion. Do you know Ricky Webb or Carl Ray Webb? A. I do, sir.

Q. Are either one of them in this Courtroom? A. Yes, sir.

Q. Who is in this Courtroom? Point him out and state his name? A. Ricky Lee Webb. Right there.

GENERAL PEEPLES: Let the record reflect the witness point to the defendant in this case.)

Q. Were they ever placed in the same cell? A. Yes, they were.

Q. Were you in that cell? A. I was.

Q. When was this? A. This was the last day of that week that I spent in jail with Carl Ray and Ricky.

Q. Did you hear a conversation taking place between Carl **[349]** Ray Webb and the defendant, Ricky Webb? A. I did.

MR. COLLINS: If the Court please, I'm going to interpose an objection at this time.

THE COURT: Objection is overruled except for any conversation between the two parties.

GENERAL PEEPLES: Mr. Rogers, I don't want you to tell the jury anything except the conversation between Ricky Webb and Carl Ray Webb. I want you to tell them all of that conversation that you heard and if you would, sir, as you say what was said, identify the party who said it.

A. Yes, sir. Well, upon placing Carl Ray in the cell with Ricky and myself, the jailer locked the three of us up and proceeded through the door and locking the doors as they were going

along. After everything quieted down, Carl Ray stated, "damn man, they have the nerve to lock me up in here with you, after the way you have done me, man, and got me in trouble. Fifty years they gave me."

MR. COLLINS: If the Court please, I'm gonna object to anything Carl Ray said.

THE COURT: Was this being directed toward the defendant? Was he talking to Ricky?

A. Carl Ray was talking to Ricky.

THE COURT: Objection overruled. Go ahead.

A. "They gave me fifty years, man, for messing around **[350]** with your greasy ass. Fifty years." And Ricky stated, "lower your voice, man. Lower your voice." He said, "damn my voice, man, fifty years they gave me."

MR. HUEY: May it please the Court, I wish to interpose another objection. Carl Ray Webb has testified here today. Anything Carl Ray Webb said, he could have testified to this.

THE COURT: Objection overruled.

A. He said, "lower your voice, man." He said, "they gave me fifty years." He said, "you've been running around in the street being a big tough guy thinking you're a lady's man." He said, "I gets the blame for everything you have ever gotten into. Fifty years of my life." At this point, Ricky stated, "lower your voice, man." He said, "man, I ought to kill you." He said, "I ought to knock your teeth down your throat."

Q. Who is saying this? A. Carl Ray. Rick said, "man, if you try that, we're gonna be fighting like hell in here." About that time, they stood up to face each other as if to advance on each other, and I jumped up between the two of them. I said, "there is not going to be any fighting in here. This place is too small as it is for three peoples in here." I said, "but fighting, we can't

have that in here over me." I said, "look, Carl Ray, lower your voice." I said, "you and your uncle talk this thing over." I said, "just settle down, man. Sit here on my bunk and get yourself **[351]** together." So Carl Ray complied. He sat down on my bunk and I sat down. I said, "get yourself together and talk this thing over." I sat down there beside Carl Ray. So Ricky at that time was sitting on his bunk. He was sitting on the top bunk. He said, "man, Katherine, your woman, been trying to get over here to see me and you wouldn't even let her come, because you was afraid that she would tell me something that you didn't want me to know." He said, "you wouldn't even bring me a pack of cigarettes." He said, "I loved you, man." He said, "you were my idol." He said, "I followed you everywhere you went. I just loved to be around you." He said, "you were my favorite uncle, man." He said, "but you have done got me fifty years." He said, "I'm eighteen years old." I said, "lower your voice, now. Talk this thing over." So about that time he lowered his voice. He kept talking. Finally, Ricky said, "yeah, man, I know I got you in a lot of trouble." He said, "I'm sorry. I instigated the whole thing." He said, "look, man, you have done already got your time. It don't make sense for both of us to do time for the same thing." He said, "you go on and pull the time and I'll do all I can to help you." He said, "look, man, I can't do no time. I already got a child and got a baby on the way." He said, "I've got a gig over here in Milan, man and I've got some money coming in." He said, "I'll share it with you." He said, "share, my ass?" He said, "where they are sending me, man, money is not gonna do me any good." He said, **[352]** "fifty years of my life, man. I'll be sixty eight years old when I get out." At that time, Carl Ray Webb was eighteen. He said, "fifty years of my life just thrown away from messing around with you. You see what you've got me into?" He said, "yeah, man, I'm sorry." He said, "I'm sorry it happened, but man, I can't do no time." So, everything just kinda quieted down and that was the general conversation throughout the time. A lady was in the cell three blocks up from us and Carl Ray said, "Shirley, call the turn key and get me out of here.

MR. COLLINS: If the Court please, I'm going to object to anything Carl Ray said.

GENERAL PEEPLES: Your Honor please, in the interest of fairness, if they don't want that known, don't say it.

THE COURT: Objection sustained.

A. Anyway, that was the general conversation throughout. Finally, they came and got Carl Ray out of the cell and taken him somewhere. I don't know. I questioned Ricky in turn about this —

MR. HUEY: I object to this.

THE COURT: Objection sustained.

Q. Mr. Rogers, you were hired, were you not, to do work in this case? A. I was.

Q. Tell the jury how much you were paid? **[353]** A. I was paid $200.00.

Q. What was that $200.00 compensation for? A. To spend a week in jail with Carl Ray Webb and Ricky Webb to obtain and pass on to the local authorities in Trenton, Tennessee, all information they told me pertinent to the case.

Q. Was your pay to be contingent in any way upon what information you came up with? A. I was not.

GENERAL PEEPLES: Thank you, sir.

Cross Examination
By Mr. Collins:

Q. Mr. Rogers, I believe you go by the name of Horse Collar? A. I do not.

Q. What name do you use as a Federal Agent when you testify in Court? A. I use several names. It all depends on what case.

Q. You never have used the name Horse Collar? A. I have not. Never.

Q. How many convictions do you have? A. I've had one.

Q. One? Think Mr. Rogers. Think back. How many convictions have you had for anything? A. I've had one conviction.

Q. What was that for? **[354]** A. Whiskey.

GENERAL SCHOONOVER: If the Court please, we are going to object to this.

MR. COLLINS: If the Court please, I think we can ask him about prior bad acts. He's not a defendant in the case.

THE COURT: If he has got any convictions that involve moral turpitude it would go toward impeachment. However, the bell has already been rung. Go ahead.

Q. Mr. Rogers, don't you have a conviction for felonious assault? A. I was acquitted of that. I was pardoned. I got a full pardon from that.

Q. You got a pardon from that? A. From Governor Winfield Dunn.

Q. But you were convicted of felonious assault with a knife, were you not? A. That's right. I was.

Q. Have you been convicted of violation of parole? A. I have not.

Q. You have never violated your parole? A. I —

GENERAL PEEPLES: Your Honor please, according to the rules of evidence, he can ask the question. He cannot ask any more questions after the answer.

THE COURT: I think if he has admitted his conviction, **[355]** that's as far as he can go with it.

Q. Back in January of 1970, Mr. Rogers, were you convicted of violating the Internal Revenue law? A. I was, sir.

Q. That's more than one conviction, isn't it? You said you had one. Isn't that more than one? A. In 1970, that's when I got my pardon from Governor Winfield Dunn for felonious assault with a knife. In '68 I was convicting of violating the Internal Revenue law.

Q. So you have got more than one conviction? A. I was pardoned from the last conviction.

Q. It's your job to get convictions for the State of Tennessee and the Federal Goverment, isn't it? A. I work for the Federal Goverment.

Q. Have you also during the last several years run a club over in Madison County? A. I did so.

Q. And did you at that club sell whiskey illegally?

GENERAL SCHOONOVER: If the Court please, we are going to object to that line of questioning.

THE COURT: Don't consider that, ladies and gentlemen. Just don't answer it.

A. If you want me to I'll answer that. I did sell whiskey on a conspiracy case against Sheriff Lewis of Madison County with the instructions from the Federal Government.

[356] Q. And they got you to testify against Shug Lewis, didn't they? A. I was working on that case.

Q. You testified in that case? A. I sure did.

Q. When you were in the jail cell with Ricky and Carl Ray Webb, you said you heard Ricky say, "I'm sorry if I got you in trouble. I instigated the whole thing." A. "I instigated the whole thing."

Q. But you didn't hear Ricky tell Carl Ray that he killed that woman? A. No, I did not.

Q. You didn't hear Ricky tell Carl Ray that he raped that woman? A. I did not. I didn't hear him deny it either.

Q. But you didn't hear him say it, did you? A. I didn't hear him deny it either.

MR. COLLINS: That's all.

(WITNESS EXCUSED)

* * * * * * * *

Opposition

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF TENNESSEE,
Petitioner

V.

RICKY LEE WEBB,
Respondent

NO. 81-1469

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

RICKY LEE WEBB, the Respondent, respectfully moves the Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915 and Rule 46 of this Court, and to file herein his response to the Petition for Writ of Certiorari to the Supreme Court of Tennessee filed by Petitioner in single counterpart, without printing the same. The typed response in opposition to the Petition for Writ of Certiorari is presented herewith for filing.

Leave to proceed in forma pauperis was sought by and granted to respondent in the Circuit Court of Gibson County, Tennessee, Court of Criminal Appeals of Tennessee and the Supreme Court of Tennessee.

The affidavit of the respondent in support of this motion is filed herewith.

DATED THE 1st DAY OF March, 1982.

Respectfully submitted,

FLIPPIN, COLLINS & HUEY
P.O. Box 679
Milan, Tennessee 38358
BY: Paul Huey
Counsel for Respondent

Flippin, Collins & Huey

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF TENNESSEE,)
Petitioner)
V.) NO. _____
RICKY LEE WEBB,)
Respondent)

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF TENNESSEE

COUNTY OF MORGAN

Ricky Lee Webb, being duly sworn, on oath deposes and says:

1. He is the respondent in the above-entitled action and makes this Affidavit in support of his Motion for Leave to Proceed in forma pauperis herein.

2. Affiant is unable because of his poverty to pay fees and costs of this case or give security therefor.

3. This is necessary in order that Respondent may file his response in opposition to the Petition for Writ of Certiorari heretofore filed by the Petitioner.

Ricky Lee Webb
RICKY LEE WEBB

SUBSCRIBED TO AND SWORN TO BEFORE ME ON THIS THE 15th DAY OF March, 1982.

Gary L. Fulton
NOTARY PUBLIC

MY COMMISSION EXPIRES:
May 20th 1985

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81-1469

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF TENNESSEE,

Petitioner,

V.

RICKY LEE WEBB,

Respondent.

On Petition for Writ of Certiorari to
the Supreme Court of Tennessee

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

FRED COLLINS
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QUESTION PRESENTED

Whether admission of an undercover agent's testimony of incriminating statements that he heard the Respondent make to his co-defendant while occupying the same jail cell violated the Respondent's right to counsel protected by the sixth and fourteenth amendment.

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NO.

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1981

STATE OF TENNESSEE,

Petitioner,

V.

RICKY LEE WEBB,

Respondent.

On Petition for Writ of Certiorari to
the Supreme Court of Tennessee

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Respondent, RICKY LEE WEBB, herewith files his response to Petitioner's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Respondent, Ricky Lee Webb, is a 24 year old black male with a 10th grade education and no prior criminal record. (App. at A-1-A-3). After the victim was discovered on September 23, 1976, Webb was arrested on September 23, 1976; but he was released that night. (App. at A-4-A-5). The next day he was again arrested and held in custody for two and one-half (2-1/2) months. (App. at A-6). He was arrested for the third and final time on January, 1978, and charged with the murder of Charlotte Blurton. (App. A-7). An arrest warrant was issued that same day.

Carl Ray Webb, the nephew of the Respondent, was also charged in the murder. He entered a guilty plea and was sentenced to imprisonment for fifty (50) years. Significantly, the Respondent's arrest took place on the same day that Carl Ray Webb entered his guilty plea.

After the Respondent was arrested, charged with the murder of Charlotte Blurton and incarcerated, Prentis Rogers, an undercover agent, was placed in the cell with him where he spent two and one-half (2-1/2) days. (App. at A-8A-9). Thereafter, Carl Ray Webb was placed in the cell with the Respondent and Rogers. (App. at A-10). Carl Ray was informed that Rogers was an undercover agent. (App. at A-11).

When Rogers was placed in the cell with the Respondent he was specifically instructed to discuss this case and try to get Respondent to admit his guilt (App. at A-12-A-13) and he

was to obtain and pass on to the authorities all information that Respondent told him in regard to this case. (App. at A-14). For this he was paid $200.00. (App. at A-14).

Prentis Rogers was allowed to testify, over the Respondent's objection, to the substance of certain conversations between Carl Ray Webb and the Respondent. (App. at A-16). Rogers testified that the Respondent and Carl Ray Webb argued for a period of time, but he encouraged them to sit down and "talk this thing over". (App. at A-17). Thereafter, Rogers heard Respondent tell Carl Ray: "Yea man, I know I got you in a lot of trouble. I am sorry. I instigated the whole thing." (A00. at A-17-A-18).

All during this period of time counsel had not been appointed for the Respondent, even though he had been formally charged with the murder. (App. at A-19)

Respondent was never advised as to his Miranda rights after his last arrest. (App. at A-20). The Respondent did sign a waiver card when he was first questioned on September 24, 1976. (App. at A-21-22); but he never signed another waiver card when he was arrested for the final time some fifteen (15) months later.

The trial judge allowed Rogers to testify concerning the content of all conversations between Respondent and Carl Ray Webb.

On appeal, the Court of Criminal Appeals reversed Respondent's conviction and remanded the case for a new trial on the basis that these incriminating statements were

deliberately elicited by state action and that Respondent's right to counsel was thereby subverted.

ARGUMENT

Although the State maintains that the holding of the Tennessee Supreme Court should be reviewed by this Court, it is the contention of Respondent that the issue raised by the State has been settled by the Tennessee Supreme Court's unanimous opinion in State v. Berry, 592 S.W. 2d 553 (1980) cert. denied, 49 U.S.L.W. 3250, and by the opinions of this Court in Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682 (1980) and United States v. Henry, 477 U.S. 264, 100 S. Ct. 2183 (1980).

Prentis Rogers had been placed in the cell with Respondent for two and one-half (2-1/2) days prior to the time that Carl Ray Webb was placed in the cell. After Carl Ray Webb entered his guilty plea he was placed in the cell with Rogers and the Respondent.

The State maintains that although Respondent had been arrested for the offense, no indictment or other formal legal proceedings had been instituted against him. True, Respondent had not been indicted but he had been incarcerated and an arrest warrant had been issued. Surely the State cannot logically maintain that the issuance of a warrant charging Respondent with the crime is not a formal legal proceeding.

The State further maintains that Carl Ray Webb was unaware that Rogers was a paid informer. This is not true. Detective LeRoy Espey testified that Carl Ray was told that Rogers was an undercover agent.

I.

MASSIAH IS APPLICABLE EVEN THOUGH RESPONDENT HAD NOT BEEN INDICTED

The State asserts that the Massiah doctrine is inapplicable to this case because Respondent had not been indicted. Admittedly, Massiah involved a post indictment situation, but the principle therein enunicated is not and has not been limited to only post indictment violations of defendants' constitutional rights.

The Tennessee Court of Criminal Appeals answered this spurious argument of the State thusly:

> "As stated in Brewer, 430 U.S. at 401, 51 L. Ed. 2d at 438, 97 S. Ct. at 1240, '(T)he clear rule of Massiah is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him.'
>
> "In the present case there is no question that adversarial proceedings had commenced against the appellant in that an arrest warrant charging him with the offense had been issued."

It is significant to note that the State never mentions the case of State v. Berry, 492 S.W. 2d 553 (Tenn. 1980), cert. denied, 49 U.S.L.W. 3250, in its Petition.

In Berry, the late Justice Henry expressly adopted and applied to that case the dissenting opinion in Miller v. California, 392 U.S. 616, 20 L. Ed. 2d 1332, 88 S. Ct. 2258 (1968). Significantly, Miller involved a pre-indictment incriminating statement.

The right to counsel attaches and the defendant is entitled to the help of a lawyer "at or after the time that

judicial proceedings have been initiated against him 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" Brewer v. Williams, 430 U.S. at 398, 51 L. Ed. 2d at 436; State v. Berry, 592 S.W. 2d at 353.

Finally, the Tennessee Supreme Court has recently set forth guidelines as to what stage of the proceedings the right to counsel attaches:

> "We hold that right to counsel attaches when adversary judicial proceedings are initiated. Initiation is marked by formal charge, which we construe to be an arrest warrant . . . .
>
> "Our conclusion that an arrest warrant is the initiation of formal charges is buttressed by several considerations.
>
> "Most assuredly, the issuance of a warrant, under Tennessee law and procedure, commits the State to a prosecution and 'a defendant finds himself faced with prosecutorial forces of organized society.'" State v. Mitchell, 593 S.W. 2d at 286, 287 (Tenn. 1980)

Accordingly, it is Respondent's position, and this was concurred in by the Tennessee Court of Criminal Appeals and Supreme Court, that the 6th Amendment right to counsel attaches when adversary proceedings have been initiated; and the issuance of a warrant is the initiation of formal charges. The pre-indictment v. post-indictment distinction which the State attempts to make has no validity, especially in light of the Tennessee Supreme Court's recent pronouncements in Berry and Mitchell.

II.

RESPONDENT'S REMARKS WERE DELIBERATELY ELICITED BY THE STATE

The State maintains that Respondent's incriminating statements were not deliberately elicited by the government

informer and, therefore, Massiah is not applicable.

The first case relied upon by the state to buttress its contention that this is not a Massiah case is United States v. Hearst, 563 F 2d 1331 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978). First of all, the State has misstated the facts of the Hearst case. The electronic monitoring device was not deliberately used by jail officials for the purpose of recording Hearst's conversation with a friend. The monitoring and recording of prisoner-visitor conversations was for the purpose of maintaining prison security:

> "We emphasize that there is no direct allegation that the jail authorities monitored and recorded the Tobin conversation for any purpose other than prison security. No argument is advanced that law enforcement agencies used prison security as a guise for what was essentially an effort to gain incriminating evidence for use against (Hearst) in her trial." United States v. Hearst, 563 F. 2d at 1347, footnote 12.

The State's reliance upon the Hearst case is misplaced. The ruling in Hearst has no application here. Massiah did not apply to Hearst because of the "absence of any governmental effort to elicit incriminating statements from the appellant." 563 F 2d at 1347.

The State engages in the fallacy that the statements of the Respondent were overheard by an undercover agent (placed there for that specific purpose) rather than a "normal inmate" and this should make no difference. The Respondent respectfully maintains that such action on the part of the State makes all the difference. The deliberately surreptitious method employed by the district attorney's office to secure these

statements is contrary to all recognized principals of our criminal justice system. If this Court reverses the ruling of the Tennessee Supreme Court then the State certainly will have no trouble in the future in making a case against an indigent, semi-literate, black defendant who is confined in jail and has never had the opportunity to consult with counsel. Such a defendant could be arrested, thrown in jail with an undercover agent and another jail-mate and tricked into making all sorts of incriminating statements. Then and only then, after he had incriminated himself, will a lawyer be appointed. Such a practice as was engaged in by the district attorney in this case was unlawful and violated every right, constitutional and otherwise, of the Respondent. It should not be tolerated nor condoned.

III.

THERE IS NO NECESSITY FOR FURTHER CONSIDERATION OF THIS CASE

The State maintains that this case deserves further consideration in light of the Innis case and United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183 (1980).

Innis is important because the Court defines "interrogation" under Miranda. "Interrogation" is defined as "questioning initiated by law enforcement officers after a person has been taken into custody." 100 S. Ct. at 1688. Significantly, "questioning" is not limited to express questioning, but includes its functional equivalent, i. e., "any words or actions on the part of the police . . . that the police should know

are reasonably likely to elicit an incriminating response from the suspect." 100 s. Ct. at 1689.

In Henry the question was not the meaning of "interrogation", but rather whether incriminating statements were '"deliberately elicited'" from the defendant in violation of Massiah. In resolving this question in favor of the accused the Court looked to: (1) the person hearing the conversations was acting under instructions as a paid government informant; (2) the informant was ostensible no more than defendant's fellow inmate; (3) defendant was in custody and under indictment.

When an accused is speaking to a known government agent he is typically aware that his statements may be used against him; but the same cannot be said when the accused is in the company of a fellow inmate who is acting by prearrangement as a government agent. As this Court so pointedly observed:

> "Conversation stimulated in such circumstances may elicit information that an accused would not intentionally reveal to persons known to be government agents." 100 S. Ct. at 2188.

As a corrollary to this, such circumstances should not be used to elicit information that an accused would not intentionally reveal in the presence of persons known to be government agents. A knowing and voluntary waiver of 6th Amendment rights does not exist when communications are made to or in the presence of an undisclosed undercover informant acting for the government.

The third consideration deemed to be relevant in Henry was the defendant's incarceration and the pressures thereby imposed upon the defendant.

> "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the government violated Henry's Sixth Amendment right to counsel. This is not a case where in Justice Cardozo's words, 'the constable blundered', Peoples v. DeFore, 242 N.Y. 13, 21, 150 N.E. 2d 585, 587 *1926); rather, it is one where the 'constable' planned an impermissible interference with the right to the assistance of counsel." 100 S. Ct. at 2189.

The decision in Henry precludes the State from intentionally creating a situation like the one created in this case; it prohibits the State from planning an interference with defendant's right to assistance of counsel. It makes no difference whether the statements of Respondent were made to the undercover agent or in his presence so long as the State intentionally creates a situation likely to induce him to make incriminating statements. Rogers was placed in a cell with Respondent with specific instructions to get Respondent to admit his guilt; after Rogers gained the confidence of the Respondent, Carl Ray Webb was placed in the cell with the two, knowing of Rogers' status as an agent. There can be no doubt that the State intentionally created a situation which this Court in Henry explicitely proscribed.

Finally, the Tennessee Supreme Court's decision in Berry leaves no doubt that Rogers' testimony is inadmissible. While a T.B.I. agent, known as Turnblazer, was incarcerated with Berry, the latter made several damaging admissions not only to Turnblazer but also to his wife.

In holding that defendant Berry's statements not only to the undercover agent but also to his wife and which were overheard by the agent could not be used against him, the Court said that such conduct was tantamount to an interrogation;

and even though the information was voluntarily given it was not admissible:

> "This was an interrogation. The only question is whether the information given by the defendant while in the jail house, after indictment, after employment of counsel, after the law enforcement authorities knew of counsel's employment and had promised no interrogation is admissible merely because it was voluntarily made. We respond in the negative." State v. Berry, 592 S.W. 2d at 557.

IV.

THE ERROR IN THE ADMISSION OF EVIDENCE WAS NOT HARMLESS

In order for error in the admission of evidence to be considered harmless, the error must be harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824 (1967).

In Blankenship v. State, 410 S.W. 2d 159 (Tenn. 1966), the court said:

> "Doubts as to whether the erroneous admission of evidence was prejudicial should be resolved in favor of the accused.
>
> The fact that evidence other than that which was improperly admitted is sufficient to justify a conviction does not make the admission of the incompetent evidence harmless, since it cannot be said what weight the jury gave to the evidence in reaching their verdict. The reviewing court will reverse a conviction where it cannot say from the record that the evidence erroneously admitted was not prejudicial to accused, or that it did not affect or contribute to, the verdict rendered."

In State v. Scruggs, 589 S.W. 2d 899 (Tenn. 1979), the evidence of defendant's guilt was overwhelming. However, in reversing the conviction, the Court said that the "strong evidence of guilt does not ipso facto mean that petitioner was not prejudiced by the statement of the prospective

juror."

Respondent respectfully maintains that this Court nor any other court cannot say beyond a reasonable doubt whether or not the admission of Rogers' testimony was harmless. There is no way to determine what weight the jury accorded this evidence in reaching its verdict.

V.

SUMMARY

The decisions of the Tennessee Courts in this case and Berry are not unwarranted extensions of the Massiah rule nor have such decisions expanded the protection afforded criminal defendants by the 6th and 14th amendments beyond previous decisions of this Court.

This decision does not involve matters of any more importance or significance than were involved in the Berry case, which case this Court refused to review. Therefore, there is no need for this Court to review the Judgment of the Tennessee Supreme Court.

CONCLUSION

For the foregoing reasons, the petition for the writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this document was served upon counsel for each of the parties affected by mailing, postage prepaid, or by delivery to the person or office of such counsel.

THIS THE 5th DAY OF MARCH, 1982.

Fred Collins

FRED COLLINS

Appendix

locked up before he was locked up.

Q. You are black?

A. I am.

Q. Ricky Webb is black as is Carl Ray Webb?

A. Yes.

Q. As a professional policeman with many years experience, did you form any opinion as to the educational background and abilities of Ricky Webb?

A. I do not.

Q. Would you consider him average --an average male?

A. Well, no, not necessarily.

Q. Would would you consider him?

A. Well, the opinion I formed on Mr. Ricky Webb, I feel like he is mentally sick.

MR. HUEY: That's all.

(WITNESS EXCUSED)

***

RICKY LEE WEBB was called and being duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HUEY:

Q. This is Ricky Lee Webb?

A. Yes.

Q. How old are you?

A. Twenty four.

Q. What is the extent of your education?
A. Tenth grade.
Q. Do you recall being in the same cell with Prentis Rogers or Bob Parker, the man who just left the stand?
A. Yes.
Q. Tell us how long you were incarcerated with him?
A. I think two and a half days or two days, something like that.
Q. Now, when you first were picked up on January 11, 1978, do you recall any officer advising you of your rights?
A. When I was picked up, there wasn't no rights said. When he came he said he had got a warrant for me for first degree murder.
Q. Who said that?
A. Leroy Espey.
Q. Did he read from a card -- did he read anything to you from a card?
A. He had something in his hand.
Q. Did he read it to you?
A. Yeah, he read it off.
Q. What did he read to you?
A. Something like Carl Ray Webb pled guilty this morning for first degree murder and rape --copped out for first degree murder and rape and saying I was with him. He haid he got a warrant for me for first degree murder and rape.

evidence in the case and you may use that evidence also in your determination. Does the state have any aggravating circumstances?

GENERAL SCHOONOVER: May it please Your Honor, you ladies and gentlemen of the jury, the State adopts the proof in full that you heard in order to reach your verdict and we stand on that proof and that alone.

THE COURT: Mr. Collins?

MR. COLLINS: Yes, sir. May it please the Court and ladies and gentlemen of the jury, the defendant will have no proof of mitigating circumstances but will stand on the proof adduced at the trial of the cause.

THE COURT: Do you gentlemen wish to make statements to the jury at this time? I think I want to know a little bit more about this matter. I might ask -- the mitigating circumstances are numerous, of course. I would like to ask does this man have any significant history of any prior criminal activity?

MR. COLLINS: May it please the Court, he has no prior record.

THE COURT: Has he had any evidence of any extreme mental or emotional disturbance at this time?

MR. HUEY: No, sir, Your Honor, he has not.

THE COURT: What is this man's age? I believe twenty four was mentioned?

MR. COLLINS: Yes, sir, twenty four.

A. Before.
Q. Are you sure of that?
A. Yes.
Q. Now, that was the first time you advised him of his rights. You say he said he did not want counsel.
A. The first time I advised him of his rights was back in Feb ruary of 1976.
Q. February of '76?
A. September of '76.
Q. We are interested in the time he was arrested January 11, 1978. That's where we are now.
A. O-kay.
Q. January 11th you advised him of his rights?
A. Yes, sir.
Q. Now, the first time you picked him up, though, was September 22, 1976.
A. 23rd.
Q. Was he arrested then?
A. Yes.
Q. For what?
A. Investigation of murder of Charlotte Blurton.
Q. Was he advised of his rights then?
A. Yes, sir.
Q. Was he incarcerated?
A. Yes, sir.

with it." He kept getting louder and kept calling Shirley to call the turn key like the dude said -- whatever name he was using. He told Carl to "shut up because they ain't gonna do nothing no way. They want us to fight or kill each other a one. That's what they want." I said, "yeah, that's probably what they want." Then Carl started back cussing and I said, "you have already got fifty years. I don't see what you are lieing on me for. You're wanting me to do some time with you, knowing that I didn't have nothing to do with it."

Q. Did you ever tell Carl Ray Webb that you participated with him in this murder?

A. No. I ain't told Carl Ray nothing about this murder.

Q. Did you ever tell Prentis Rogers or Bob Parker that?

A. No, sir, I didn't.

Q. You were first arrested on the 23rd of September, 1976?

A. 23rd?

Q. 22nd or 23rd of September, a day or two after the murder?

A. No, I was arrested that night.

Q. That same day, the 22nd?

A. Yes, about 11:30, something like that.

Q. How long did you stay in jail then?

A. I stayed until the next morning, but by the time I got home good, they was right back out there to pick me up and then, -- I can't remember which onn of the deputies gold me, that they

didn't mean for me to leave no way.

Q. Are you telling us you just spent one night in jail the first time?

A. When they first picked me up?

Q. Yes.

A. I spent over night, but they came back the same day and picked me right back up.

Q. They took you back down to jail again?

A. Right.

Q. How long did you stay down there?

A. Two and a half months.

Q. Then what happened?

A. Didn't nothing happen. First they kept asking me questions. Then I kept telling them I didn't have nothing to do with it, so one day they came down and got me and said the D.A. wanted to see me, so I went up to see Mr. Schoonover. When I went up to see him he was telling me that he can't hold me no longer in jail. He was talking about the only way he could hold me was I would have to sign some kind of papers. I told him that if I'm free to go I ain't gonna sign no papers. Then he said, "you're free to go."

Q. You went home?

A. Yes, sir.

Q. On Nelson Road?

A. Right.

Q. Carl Ray was instigating this conversation?
A. Yes. He said, "man, I've been following you. I admired you, man. You was my idol." He said, "I worshipped you." He said, "I done everything that you ever told me, I liked to follow you around." He said, "I liked to go with you." He said, "but you got me in trouble, man, fifty years of my life." He said, "do you remember the time you raped that woman and they put it off on me?" He said, "I taken the blame for that." He said, "all my life, man, I've been taking the blame for your wrong doing." He said, "I'm tired of it. You're gonna do this fifty years with me." He said, "man, I'm sorry I got you in this trouble." He said, "but like I told you, I can't do no time." It went on like that until finally the man came and got him out.
Q. Came and got who out?
A. Carl Ray.
Q. And then you stayed in there with Ricky?
A. Yes. I did.
Q. And didn't you after Carl Ray left and things quieted down, didn't you say, "come on, Ricky, let's go over your story again. Didn't you?
A. Yes.
Q. Did you go over it several times with him?
A. Two or three times.
Q. At any time did you advise him of his rights when you

law enforcement officer talked to Carl Ray Webb and Prentis Rogers at any other time?

A. I know that some Deputy Sheriffs talked with Prentis Rogers -- at least they told me they had.

Q. They could have talked to Carl Ray Webb also?

A. That's correct.

Q. They knew that Prentis Rogers was in your employ?

A. That's correct.

MR. HUEY: That's all.

GENERAL SCHOONOVER: I have no questions. Come down.

(WITNESS EXCUSED)

***

PRENTIS ROGERS was called and being duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HUEY:

Q. This is Prentis Rogers?

A. Yes.

Q. What line of work are you in?

A. Special undercover work for the U. S. Treasury Department.

Q. Do you occasionally get loaned out to the TBI?

A. Yes.

Q. Were you on loan on January 11, 1978?

A. Yes, I was.

Q. Do you recall being placed in the Gibson County jail?
A. Yes, sir.
Q. Were you placed in the same cell with Carl Ray Webb?
A. I was.
Q. I'll ask you, do you know whether Carl Ray Webb was informed about your undercover background at the time you first got in the cell with him?
A. No, he wasn't.
Q. Now, at that time you played a tough guy, I believe, or a bad type person?
A. I went under the alias of Bob Parker.
Q. I'm sorry?
A. At that time, my name was Bob Parker.
Q. You told Carl Ray Webb that you had killed some policemen and robbed banks and that sort of thing?
A. That's right.
Q. How much time did you spend in the cell with him?
A. Two and a half days.
Q. And then you went in the cell with Ribky Webb?
A. Yes, I did.
Q. How much time did you spend in there with him?
A. Approximately two and a half days.
Q. During that time you were in the cell with Ribky Lee Webb, he never made any incriminating statements concerning this murder, did he?

Webb's cell also?

A. I did.

Q. For what purpose?

A. Investigation.

Q. To see what he could find out?

A. Investigation.

Q. Det. Espey, did you then cause Ricky Webb, Carl Ray Webb and Prentis Rogers, the undercover agent, to all be placed in the same cell?

A. I did.

Q. For what purpose?

A. Investigation.

Q. At that time, Ricky Lee Webb had been placed under arrest. You had executed a Warrant for Murder?

A. Yes, sir.

Q. Had this man been advised of his rights -- Ricky Webb?

A. Yes, sir.

Q. I'll ask you, did he understand those rights?

A. Yes, sir.

Q. What makes you make that statement?

A. Well, I advised him of his rights several times. I let him sign a rights waiver card at least one or more times. He told me the last time he understood them.

Q. Do you have these cards that he signed?

A. Yes, sir, in my file.

placed him in a cell back in Trenton, what conversations did you have with him prior to you putting Prentis Rogers in the same cell with Carl Ray Webb?

A. None. I don't remember any conversation about it. Are you talking about putting Carl Ray Webb in the same cell with Prentis Rogers?

Q. Yes, sir.

A. None.

Q. Were there any conversations with Carl Ray Webb prior to the time you put both Ricky Webb and Carl Ray Webb in the same cell with Prentis Rogers?

A. Yes, sir.

Q. What was that conversation?

A. We told him there was an Agent in there at that time.

Q. You told Carl Ray that there --

A. I believe we did. I couldn't swear to that on the stand, but I believe we did.

Q. You are pretty sure of that?

A. I think we did.

Q. Carl Ray was told?

A. I wouldn't swear to that, but I think we told him.

Q. Who did?

A. I don't know whether I did or the Agent told him.

Q. Told Carl Ray that there was an agent going in the cell with the three of them?

and to discuss with each of them and obtain as much information as possible that either one of them might know concerning the rape and death of Charlotte Blurton.

Q. Did Agent Rogers go about doing this?

A. He did.

Q. Did you accompany him to the Gibson County Jail?

A. No, sir, I brought him to the Attorney General's office and then a deputy carried him on down to the jail.

Q. Who did you turn him over to there at the Attorney General's office?

A. One of the deputy sheriffs. I don't remember which one it was.

Q. Did you have any conversations with Carl Ray Webb on January 11th when you first put Prentis Rogers in the cell with Carl Ray Webb?

A. Repeat the question, please.

Q. On January 11, 1978, the day Carl Ray Webb and Prentis Rogers were placed in the cell together the first time, did you have any instructions for Carl Ray Webb at that time?

A. No, sir. All my instructions were to Prentis Rogers.

Q. Did you come back and talk to your agent Rogers when he left Carl Ray's cell and went into Ricky's cell?

A. I did not.

Q. When was the next time you talked to Agent Rogers after you sent him over there?

went over those stories with him each time?

A. Well, no.

Q. You did not advise him of his rights?

A. No, I did not.

Q. Were you wired, Mr. Rogers?

A. Yes, I was.

Q. Where is the tape transcript?

A. Well, the tape only played for a short while and then it played out.

Q. Where is that tape now?

A. You'll have to ask him.

Q. Lieutenant Espey?

A. Yes.

Q. He has it?

A. I don't know. You would have to ask him. I have no knowledge about it.

Q. You turned it over to him?

A. I turned it over to the Detective who was in charge of the investigation.

Q. What were your instructions when you were placed in the cell with Ricky?

A. To see if I could get them to admit their innocence or guilt in the rape of Mrs. Charlotte Blurton.

Q. You started your testimony by telling me you are a pro at this, aren't you?

A. I was paid $200.00.
Q. What was that $200.00 compensation for?
A. To spend a week in jail with Carl Ray Webb and Ricky Webb to obtain and pass on to the local authorities in Trenton, Tennessee, all information they told me pertinent to the case.
Q. Was your pay to be contingent in any way upon what information you came up with?
A. I was not.
GENERAL PEEPLES: Thank you, sir.
CROSS EXAMINATION
BY MR. COLLINS:
Q. Mr. Rogers, I believe you go by the name of Horse Collar?
A. I do not.
Q. What name do you use as a Federal Agent when you testify in Court?
A. I use several names. It all depends on what case.
Q. You never have used the name Horse Collar?
A. I have not. Never.
Q. How many convictions do you have?
A. I've had one.
Q. One. Think Mr. Rogers. Think back. How many convictions have you had for anything?
A. I've had one conviction.
Q. What was that for?

MR. JONES: I wouldn't want to do that.

THE COURT: Let me ask him, Mr. Peeples. The question is not whether or not you would want to, none of us would want to, but the question is, would you consider it?

MR. JONES: I guess so, Judge.

THE COURT: All right, sir. Let's go on then, Mr. Peeples.

GENERAL PEEPLES: Ladies and gentlemen, the defendant is also accused of the crime of forcible rape. Do any of you have any strong feelings about that offense one way or the other that would keep you from giving the defendant a fair trial?

(WHEREUPON, all prospective jurors answered negatively.)

GENERAL PEEPLES: Do any of the rest of you have any -- would you all consider the death penalty if Ricky Webb is found guilty? I'm not asking you if you will impose it. I'm only asking if you will consider it? Have I confused you all with my questions?

MRS. MAX: I'm not confused about the question. I'm confused about the -- I believe in it as a philospphy. Being involved in it is something else. I'm not sure what's reasonable.

GENERAL PEEPLES: Will you consider it is all that we are asking? We are not trying to exact a promise from you that you will use it.

MRS. MAX: I think so.

GENERAL PEEPLES: We apppeciate your honesty in this on all of your parts very much. Have any of you read anything

Ray Webb and the defendant, Ricky Webb?

A. I did.

MR. COLLINS: If the Court please, I'm going to interpose an objection at this time.

THE COURT: Objection is overruled except for any conversation between the two parties.

GENERAL PEEPLES: Mr. Rogers, I don't want you to tell the jury anything except the conversation between Ricky Webb and Carl Ray Webb. I want you to tell them all of that conversation that you heard and if you would, sir, as you say what was said, identify the party who said it.

A. Yes, sir. Well, upon placing Carl Ray in the cell with Ricky and myself, the jailer locked the three of us up and proceeded through the door and locking the doors as they were going along. After everything quieted down, Carl Ray stated, "damn man, they have the nerve to lock me up in here with you, after the way you have done me, man, and got me in trouble. Fifty years they gave me."

MR. COLLINS: If the Court please, I'm gonna object to anything Carl Ray said.

THE COURT: Was this being directed toward the defendant? Was he talking to Ricky?

A. Carl Ray was talking to Ricky.

THE COURT: Objection overruled. Go ahead.

A. "They gave me fifty years, man, for messing around

with your greasy ass. Fifty years." And Ricky stated, "lower your voice, man. Lower your voice." He said, "damn my voice, man, fifty years they gave me."

MR. HUEY: May it please the Court, I wish to interpose another objection. Carl Ray Webb has testified here today. Anything Carl Ray Webb said, he could have testified to this.

THE COURT: Objection overruled.

A. He said, "lower your voice, man." He said, "they gave me fifty years." He said, "you've been running around in the street being a big touch guy thinking you're a lady's man." He aaid, "I gets the blame for everything you have ever gotten into. Fifty years of my life." At this point, Ricky stated, "lower your voice, man." He said, "man, I ought to kill you." He said, "I ought to knock your teeth down your throat."

Q. Who is saying this?

A. Carl Ray. Ricky said, "man, if you try that, we're gonna be fighting like hell in here." About that time, they stood up to face each other as if to advance on each other, and I jumped up betwenn the two of them. I said, "there is not going to be any fighting in here. This place is too small as it is for three peoples in here." I said, "but fighting, we can't have that in here over me." I said, "look, Carl Ray, lower your voice." I said, "you and your uncle talk this thing over." I said, "just settle down, man. Sit here on my bunk and get yourself

together." So Carl Ray complied. He sat down on my bunk and I sat down. I said, "get yourself together and talk this thing over." I sat down there beside Carl Ray. So Ricky at that time was sitting on his bunk. He was sitting on the top bunk. He said, "man, Katherine, your woman, been trying to get over here to see me and you wouldn't even let her come, because you was afraid that she would tell me something that you didn't want me to know." He said, "you wouldn't even bring me a pack of cigarettes." He said, "I loved you, man." He said, "you were my idol." He said,"I followed you everywhere you went. I just loved to be around you." He said, "you were my favorite uncle, man." He said, "but you have done got me fifty years." He said, "I'm eighteen years old." I said, "lower your voice, now. Talk this thing over." So about that time he lowered his voice. He kept talking. Finally, Ricky said, "yeah, man, I know I got you in a lot of trouble." He said, "I'm sorry. I instigated the whole thing." He said, "look, man, you have done already got your time. It don't make sense for both of us to do time for the same thing." He said, "you go on and pull the time and I'll do all I can to help you." He said, "look, man, I can't do no time. I already got a child and got a baby on the way." He said, "I've got a gig over here in Milan, man and I've got some money coming in." He said, "I'll share it with you." He said, "share, my ass?" He said, "where they are sending me, man, money is not gonna do me any good." He said,

Q. You said you were pretty sure?
A. Yes, sir. It's been a lot of questions and a lot of things --
Q. Who else was there besides yourself?
A. If it was said it would be a TBI agent there.
Q. Who was that?
A. Warren Jones.
Q. This was prior to the time to --
A. I believe Bob Inman was there.
Q. This was prior in time to the best of your knowledge of Ricky Webb having an attorney appointed?
A. I don't remember whether he had an attorney appointed or had even asked for one.
Q. But to your knowledge, there had been no counsel over to visit or to your knnwledge appointed for Ricky Webb at this time?
A. I say again, at this time I don't know whether he had been appointed counsel or asked for counsel.
Q. How long did this -- what was the time frame, from January 11, 1978 -- how many days did this undercover agent spend over there with the Webb boys?
A. I think three, four,five days.
Q. If I told you Ricky Webb was not appointed counsel until after January 17th, you wouldn't argue with that statement, would you?

Q. Did he ever advise you concerning your right to an attorney?

A. Not right off hand, no.

Q. Did he ever advise you of your right to an attorney?

A. Not that I can remember, no.

Q. Now, do you recall having a conversation while you were in the jail cell with Carl Ray Webb, yourself and Prentis Rogers.

A. Yes, sir.

Q. Would you tell us what went on in there?

A. When they brought Carl Ray back there -- first I was wondering what they put me and him intthe cell for, because I know we was suppose to be split apart. So when they put him in the cell, he started cussing and getting loud and talking about what I had did to him -- how I had got him fifty years and all of that. I told him I hadn't got him nothing. I said what I got when the warrant was read off to me you copped out for it. Then he started talking about , "if it wasn't for you I never would have did this." I said, "you wouldn't did what?" He said, "you know what." I said, "you know doggoned well that I wasn't with you, Carl Ray." I said, "I don't know what they have did to you -- brainwashed you or something." I said, "you know I didn't have nothing to do with that." He come talking about, "yeah, you had something to do with it. You know you did." I kept telling him, "no, I didn't have nothing to do

this pistol be admitted as a exhibit and request permission to pass it to the jury.

THE COURT: All right.

(WHEREUPON, said exhibit was passed to the jury for its viewing.)

Q. Mr. Espey, have any tests been made on the shell casings previously passed to the jury?

A. Yes, sir.

Q. In regadd to whether or not they fit the gun in question?

A. Yes, sir, by the TBI.

Q. What did those tests disclose?

A. Or the FBI.

Q. What did those tests disclose?

A. That they were the same.

Q. By that you mean what?

A. They came out of the gun.

Q. Mr. Espey, you have testified that you talked to Carl Ray Webb. Did you ever at any time during your investigation of this case talk to Mr. Ricky Lee Webb?

A. Yes, sir.

Q. Prior to talking to him, what, if anything, did you tell him?

A. I advised him of his rights. The right to remain silent and on one occasion at least, I got him to read a rights

The attached rights waiver card, identified and authenticated as Exhibit No. 9 and entered on page 247 of this Bill of Exceptions, having been duly marked and entered at the trial, is hereby made a part of the transcript.

_____,1979.

_____
Judge